

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS R. AUSTIN,

Petitioner,

ORDER

v.

09-cv-0380-bbc

JODINE DEPPISCH, Warden,
Fox Lake Correctional Institution,

Respondent.

Thomas R. Austin has filed a notice of appeal and request for a certificate of appealability from this court's orders of June 23, 2009 and July 13, 2009, dismissing his petition for a writ of habeas corpus and denying his request for a stay. Petitioner's request for a certificate of appealability must be denied. The basis for the dismissal and denial of a stay was that petitioner had not obtained authorization from the court of appeals to file his successive petition. No reasonable jurist would debate the conclusion that the petition was successive or that it had to be dismissed for lack of jurisdiction. The fact that petitioner now has "new" grounds for attacking his conviction does not change the fact that this is petitioner's second attack on that conviction. Under 28 U.S.C. § 2244(b), the only court authorized to determine whether petitioner meets one of the exceptions to the bar on successive petitions is the court of appeals. Petitioner can seek that authorization directly, without going through the appellate process. 28 U.S.C. § 2244(a)(3)(A) ("Before a second

or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”). Accordingly, because there is no merit to his filing an appeal, his motion for a certificate of appealability is denied. Further, he is not entitled to proceed in forma pauperis because I certify that his appeal is taken in bad faith. 28 U.S.C. § 1915(a)(3).

ORDER

IT IS ORDERED that petitioner Thomas Austin’s request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that petitioner’s request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the petitioner may request a circuit judge to issue the certificate.

Entered this 28th of July, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge